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CLEARINGHOUSE RULE 98-119

Comments

[NOTE: All citations to “Manual” in the comments below are to the Administrative Rules Procedures Manual, prepared by the Revisor of Statutes Bureau and the Legislative Council Staff, dated September 1998.]

1. Statutory Authority

Section HA 3.01 (1) cites in part ss. 46.016 and 49.45 (5) and (10), Stats., as statutory authority for the promulgation of ch. HA 3 by the Division of Hearings and Appeals. These statutes appear to relate to responsibilities and functions of the Department of Health and Family Services and not directly to the authority of the division to undertake the hearings described in ch. HA 3. An additional citation to s. 227.43, Stats., as affected by 1997 Wisconsin Acts 3 and 27, would make the statement of statutory authority more accurate. The statement of authority also should support the division’s activities with respect to hearing appeals of decisions made by the Department of Administration. Finally, s. HA 3.12 provides for a division review of a Wisconsin Works agency fact-finding decision. However, both s. 49.152, Stats., as affected by 1997 Wisconsin Act 27, and s. DWD 12.22 (2) and (3) appear to provide for review of Wisconsin Works agency decisions by the Department of Workforce Development (DWD), rather than by the Division of Hearings and Appeals. Since the review by DWD is not a hearing of a contested case, and since the authority of the division under s. 227.43 (1) (by), Stats., is to preside over a hearing of a contested case, what statutory authority exists for the division to review decisions of a Wisconsin Works agency?

2. Form, Style and Placement in Administrative Code

a. The rule-making order does not contain an introductory clause, a plain language analysis or a fiscal estimate. These should be inserted into the rule. [s. 1.02 (1), (2) and (7), Manual.]

b. In s. HA 3.01 (2), the phrase “These rules govern” should be replaced by the phrase “This chapter.” Also, in the last sentence, the phrase “These rules” should be replaced by the phrase “This chapter.”

c. In s. HA 3.03 (9), it is not necessary to continually repeat par. (am) in subsequent citations to s. 48.57 (3m) (am) 1., Stats.

d. In s. HA 3.03 (6), in order to maintain a parallel structure, the word “only” and the phrase “is appealable” should be deleted.

e. In s. HA 3.05 (2), it appears that the defined term “representative” should be used. [See also s. HA 3.06 (6) (b).]

f. In s. HA 3.05 (3), the introductory material does not grammatically lead into the remaining paragraphs. Consequently, the introductory material should be renumbered as sub. (3) (a) and the remaining paragraphs and internal cross-references should be renumbered accordingly.

g. In s. HA 3.08, the notation “(4)” should be inserted before the paragraph that precedes sub. (5).

h. In s. HA 3.11 (2), the word “must” in the last sentence should be replaced by the word “shall.”

i. Section HA 3.12, pars. (a), (b) and (c) would more appropriately be separate subsections, since they do not all necessarily relate to s. HA 3.12 (1). They should be renumbered accordingly.

4. Adequacy of References to Related Statutes, Rules and Forms

a. The reference in s. HA 3.02 (9) to the U.S. Code citation for the Low-Income Home Energy Assistance Program appears to be wrong. The correct citation appears to be 42 U.S.C. s. 8621.

b. The reference to the Wisconsin Works Program in s. HA 3.02 (13) should be made consistent with the statutory references made to that program in s. HA 3.02 (17). Therefore, instead of saying s. 49.141 et. seq., the reference should be to ss. 49.141 to 49.161, Stats.

c. In s. HA 3.02 (17), the word “to” should be inserted between “ss. 49.141 and 49.161, Stats.”

d. Section HA 3.04 is erroneously cross-referenced in ss. HA 3.04 and 3.05 (1) and (3) (intro.) and (a). The correct citation appears to be s. HA 3.03.

5. Clarity, Grammar, Punctuation and Use of Plain Language

a. In s. HA 3.01 (2), the word “Wisconsin” should be capitalized.

- b. In s. HA 3.02 (2), the word “service” on the last line should be “services.”
- c. In s. HA 3.02 (4), (8) and (13), the second word of that definition should not be capitalized.
- d. Section HA 3.02 (11) defines Medicaid waiver services as home and community-based services under s. 46.27, Stats. There are many other Medical Assistance (MA) waiver programs in other parts of the statutes. Is the appeals procedure only to cover the Medicaid Waiver Program under the Community Options Program? If so, this definition is correct; if not, these statutory references need to be expanded to include the other MA waiver programs.
- e. Section HA 3.02 (16) would read more clearly if commas were placed before and after the phrase “other than under local county-funded programs.”
- f. In s. HA 3.03 (intro.), the word “action” should be made plural.
- g. In s. HA 3.03 (1), the words “determination” in the first line and “in writing” in the second line should be deleted and, instead, the term “written statement” should be inserted after the word “the” on the first line.
- h. The mailing address of the Division of Hearings and Appeals set forth in s. HA 3.05 (2) (b) should be placed in a note to the rule.
- i. In s. HA 3.06 (7), it should be clarified that the hearing should be tape-recorded, rather than simply “recorded.” Tape-recordings are referred to in s. HA 3.09 (1) and (7).
- j. Section HA 3.11 (4) states that the “department or agency has 15 days from receipt of a complete costs motion to respond in writing to the administrative law judge.” This sentence should be rewritten to state that the “department or agency shall respond in writing to the administrative law judge within 15 days of receipt of a complete costs motion.” Further, if the department or agency fails to respond, what is the consequence of that failure?

6. Potential Conflicts With, and Comparability to, Related Federal Regulations

42 C.F.R. s. 431.220 (a) (3) provides for an appeal of an erroneous nursing home transfer or discharge. This is not included in the list of appealable items in s. HA 3.03. The division should consider adding this to the list, in conformity with the federal regulation.